FILE NO. - 2001/015

REPORT WITH RESPECT TO THE APPLICATION FOR REVIEW OF [redacted] IN RELATION TO FEES LEVIED FOR INFORMATION REQUESTED BY SASKATCHEWAN FINANCE

By an Access to Information Request Form dated August 30, 2000, [redacted] (the "Applicant") requested from Saskatchewan Finance (the "Respondent") access to a budget briefing binder.

By a letter dated April 23, 2001, the Applicant wrote to me, requesting that I review the fees levied in this matter by the Respondent for providing him with access to the material requested. His letter stated as follows:

> "On April 20th 2001, I paid $585.75 to the Department of Finance to receive material they were prepared to release, following a request for access to information made by me, last September. (Enclosed is a copy of their invoice.)
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> The department included in their price 13.5 hours of "excess time". In a telephone conversation, on April 20th, Mr. Wm. R. Van Sickle, the access co-ordinator for the department, told me that the charge was for the time spent by officials in "discussions, decision-making, and physical severing" of the material they ultimately released.
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> In short, the Department charged – as preparation time – time they spent to not release information.
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> This is contrary to the Act and its regulations. The Act and regulations expressly prohibit charging people for that which they do not receive. (Arguments on this point have been made in previous submissions to you, and I would invite you to refer to those, as I feel the points made are applicable here, as well.)
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> It is, simply put, a wrong interpretation of what is an "allowable expense" relating to the preparation of documents for release. To

let this stand would be a serious problem, undermining the object and purpose of the Act.

What is now to prevent departments from scheduling long meeting sessions – chargeable to those seeking access to documents – to mull over, consider, and determine what may or may not be released?

What is worse: how can one expect follow-up requests to be handled? Will other people also be required to pay the "thinking time" of the department, when the thinking has already been charged and paid? Is that a fair system? That is: the first person to ask for information bears the expense of a department's deliberations relating to those portions of a document that are not to be released? Does the Commissioner expect all people who make subsequent requests for access to also pay the "thinking time" charge? This would result in departments profiting from their actions!

While one is naturally hesitant to take things to absurd conclusions, when faced with an outrageous fee one wonders where things will go.

The principle, I submit, is really quite simple: you can not charge for what you do not release. In this case, it was readily admitted that the expense was not "looking" for the relevant documents. The material was on hand and instantly available; the budget briefing binder. The issue, for the department, was "how much" of the binder to release? The longer they spent considering that issue, the higher the fee. That is not "preparation". It is deliberation.

The act and regulations ought not be read as supporting this sort of cost. The time spent physically preparing the material is what was contemplated by the legislature. That is, time at a photocopy machine, time in a basement archive, time at a computer terminal, etc. It does not cover time at a conference room table discussing possible interpretations of the Act.

A person applying for access to information is not engaging the department in providing a legal interpretation of a statute. The applicant is simply asserting a right, under law. If the department if of the view that the law does not support the applicant: they are free to say so. But they are not to charge an applicant for the time they spent arriving at that conclusion. How would the Commissioner propose to ensure that, if this is allowed, it is not abused?

The commissioner could even ask of the department why his copy was so long in coming. What "search and preparation" was involved in that? Their answer would illuminate the matter.

Perhaps, the department meant to delay matters. Perhaps that was a tactical maneuver? Is the charging of "thinking time" a tactical

> move? Is it the hope of the department to dissuade those without deep pockets from gaining access to information?
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> This is not a matter of "how much?" can [redacted] afford to pay. The applicant stands as all citizens do, asserting a right. To press the point that the fee is not legally charged is to press the point for all citizens, of grand or modest purse.
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> I hope this submission is useful to the commissioner."

In a formal Request for Review, dated May 8, 2001, addressed to me, the Applicant indicated that he was requesting the review as he disagreed with the fees levied by the Respondent, and referred to his letter to me dated April 23, 2001. I then wrote to the Respondent by letter dated May 28, 2001, requesting that they provide me with their position regarding the Request for Review and the arguments advanced by the Applicant respecting the alleged overcharge by the Respondent for the production of the materials.

By letter dated May 31, 2001, the Respondent replied to me as follows:

> "I have reviewed [redacted] appeal of our decision to charge a fee for release of information provided to him under his Application Number [redacted].
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> The first question that I would raise, and on which I would appreciate your decision, is whether or not this matter is appealable under Section 49(1) of the *Freedom of Information and Protection of Privacy Act* (the Act), in particular subsection 49(1)(a). The Act provides that an applicant may appeal a decision of a head pursuant to sections 7, 12 or 37. Section 9 of the Act provides for the application of fees. Therefore, the decision to charge a fee is not made pursuant to any of the sections provided under 49(1).
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> If you feel that this matter has been appropriately appealed under the Act, I offer the following comments on the applicant's appeal:
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> The applicant states that the department charged, as preparation time, time spent to not release information. In fact, the Department charged for time spent to prepare a very significant document for release under the Act. Section 6(2) of *Freedom of Information and Protection of Privacy Regulations* (the regulations) provides as follows:
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> > '6(2) where time in excess of two hours in spent in searching for a record requested by an applicant or in preparing it for disclosure, a fee of $15 for each half-hour or portion of a half-hour of that access time is payable at the time when access is given.'

In order to prepare a document for disclosure, the Department must undertake certain processes:

- first, the record must be searched and found (in this case, no time was charged for searching the record, as it was readily available);

- second, time must be spent by officials to review the record and determine if the record or portions of the record fall under the exemptions contained within the Act and whether those exemptions are mandatory or discretionary. If discretionary, a determination must be made as to whether or not the head is willing to release the information; and,

- time is required for physically preparing the record for release – for severing portions of the record for which exemptions apply and for copying the record for the applicant.

It is not reasonable, in our view, to assert that time spent conducting the necessary processes is time spent to "not release information". In fact, the applicant received the majority of the pages of a record (the briefing book) and time was required to prepare that record for disclosure. Determination of what may and what may not be released within a record must reasonably be considered part of the preparation time and fee.

The applicant states that "The Act and regulations expressly prohibit charging people for that which they do not receive". Section 8(1) of the Regulations stipulates that no fees are payable where access to a record is refused. The applicant was provided with information applied for and therefore was not refused access. It would seem that Section 8(1) does not apply in this case.

The applicant asserts that the first person to ask for information "bears the expense of a department's deliberations relating to those portions of a document that are not to be released". As mentioned above, we view the work performed as time spent to prepare the record for disclosure. The first applicant to request information is the first to pay for it. A second applicant would benefit from the fact that the search and preparation time was already done. The Department would not double-charge for subsequent releases of the same information but only for the time that was actually spent to prepare the second record for disclosure.

The applicant contends that "time spent physically preparing the material is what was contemplated by the Legislature" and "does not cover time at a conference room table discussing possible interpretations of the Act". This broad statement is unsupported in the applicant's appeal. In fact, an integral part of preparing a document for disclosure is determining how the Act applies to that document. Since the Act permits the Department to charge a fee for "preparing a document for disclosure", it is only reasonable to assume that all time related to that activity may be charged to the

applicant. Before requesting documents, applicants must understand that there are preparation costs incurred beyond the physical preparation of a document for disclosure and that the Act provides that fees may be charged to ensure that the public purse is reimbursed for the costs of an applicant's request.

I trust this is satisfactory. Should you require any additional information or clarification of our views on this matter, please do not hesitate to contact me at 787-6621 or the Department's Access Officer, Bill Van Sickle, at 787-6530."

The relevant provisions of *The Freedom of Information and Protection of Privacy Act* are as follows:

"7(1) Where an application is made pursuant to this Act for access to a record, the head of the government institution to which the application is made shall:

(a) consider the application and give written notice to the applicant of the head's decision with respect to the application in accordance with subsection (2); or

(b) transfer the application to another government institution in accordance with section 11.

(2) The head shall give written notice to the applicant within 30 days after the application is made:

(a) stating that access to the record or part of it will be given on payment of the prescribed fee in setting out the place where, or manner in which, access will be available;

(b) if the record requested is published, referring the applicant to the publication;

(c) if the record is to be published within 90 days, informing the applicant of that fact and of the approximate date of publication;

(d) stating that access is refused, setting out the reason for the refusal and identifying the specific provision of this Act on which the refusal is based;

(e) stating that access is refused for the reason that the record does not exist; or

(f) stating that confirmation or denial of the existence of the record is refused pursuant to subsection (4).

(3) A notice given pursuant to subsection (2) is to state that the applicant may request a review by the commissioner within one year after the notice is given.

(4) Where an application is made with respect to a record that is exempt from access pursuant to this Act, the head may refuse to confirm or deny that the record exists or ever did exist.

(5) A head who fails to give notice pursuant to subsection (2) is deemed to have given notice, on the last day of the period set out in that subsection, of a decision to refuse to give access to the record."

9(1) An applicant who is given notice pursuant to clause 7(2)(a) is entitled to obtain access to the record on payment of the prescribed fee.

(2) Where the amount of fees to be paid by an applicant for access to records is greater than a prescribed amount, the head shall give the applicant a reasonable estimate of the amount, and the applicant shall not be required to pay an amount greater than the estimated amount.

(3) Where an estimate is provided pursuant to subsection (2), the time within which the head is required to give written notice of the applicant pursuant to subsection 7(2) is suspended until the applicant notifies the head that the applicant wishes to proceed with the application.

(4) Where an estimate is provided pursuant to subsection (2), the head may require the applicant to pay a deposit of an amount that does not exceed one-half of the estimated amount before a search is commenced for the records for which access is sought.

(5) Where a prescribed circumstance exists, the head may waive payment of all or any part of the prescribed fee.

49(1) Where:

(a) an applicant is not satisfied with a decision of a head pursuant to section 7, 12 or 37;

(b) a head fails to respond to an application for access to a record within the required time; or

(c) an applicant requests a correction of personal information pursuant to clause 32(1)(a) and the correction is not made;

the applicant may apply in the prescribed form and manner to the commissioner for a review of the matter."

The relevant provisions of *The Freedom of Information and Protection of Privacy Act Regulations* are as follows:

> "6(2) Where time in excess of two hours in spent in searching for a record requested by an applicant or in preparing it for disclosure, a fee of $15.00 for each half-hour or portion of a half-hour of that access time is payable at the time when access is given.
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> 7(2) Where the amount of an estimate exceeds the actual amount of fees determined pursuant to Section 6, the actual amount of fees is the amount payable by the application.
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> 8(1) No fees are payable where access to a record is refused."

With respect to the first issue raised by the Respondent in its May 31, 2001 correspondence, that is whether this matter is appealable under the Act, it is my view that Section 7(2)(a) allows me to review the decision of a head of a government department regarding the fee applicable with respect to an application. Though Section 9 specifically deals with the logistics of fees charged, this section is not determinative of the reviewability of fees charged. Further, I find that two of the sections relied upon by the Respondent are not relevant with respect to this issue. Section 12 deals with an extension of time by the head of a government institution. Section 37 deals with decisions where a third party is involved.

I now turn to the issue of whether the fees levied in this matter by the Respondent were reasonable.

In general, I concur with the Respondent's assertion that preparation costs are incurred by a government department beyond the physical preparation of a document for disclosure, and further that *The Freedom of Information and Protection of Privacy Act* provides that such fees may be charged to ensure that the public purse is reimbursed for the costs of an Applicant's request for information.

The Applicant contends that the Respondent cannot charge for what it did not release. In my view, Section 8(1) of the Regulations is not applicable in this situation. The Respondent released the majority of the requested document, severing only parts of it. As such, I do not find that this situation, in which 723 pages were photocopied and provided to the Applicant, should be classified in the same way as one in which access was refused.

In general, time spent to decide what portions of a document or documents are severable, so that the remaining portions can be disclosed, may be allowable. I find that this can be part of the allowable preparation time as provided for by the Regulations. Such time spent must be reasonable, and whether it is reasonable should be determined on an individual basis with regard to the volume and type of documents.

In conducting this Review, I have taken into account the type of document involved, and their lengthy and varied content. In this case, the Respondent's deliberation time would not have been confined to considering simply one or two exemptions as provided for by the Act, but would have involved examining and considering many different exemptions. As well, every page of the Briefing Book would have had to have been reviewed by the Respondent in order to decide whether disclosure was appropriate, or whether severance should be applied, given the exemptions outlined in the Act. I note that the Respondent charged for 13.5 excess hours of time spent. This equates to slightly more than one minute per page disclosed. I find that in this particular case, this is within an acceptable range.

In conclusion, I do not recommend that the Respondent adjust its fees charged in this matter.

Dated at Regina, in the Province of Saskatchewan, this 2nd day of August, 2001.

GERALD L. GERRAND, Q.C.
Commissioner of Information
and Privacy for Saskatchewan